SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 207

COMPRESS OF UNION ET AL.,

Petitioner,

vs.

A. H. STONE, TAX COMMISSIONER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Circuit Judge delivered no opinion, but merely entered his judgment. The opinion of the State Supreme Court appears in the Transcript, page 14, and is also here appended (Appendix C), having been initially decided by Division "A", January 29, 1940, compare *Mississippi State Tax Commission* v. *Brown,* in banc, 193 So. 794 (Appendix D).

II.

Judisdiction.

Jurisdiction is claimed under Judicial Code 237, as amended, Revised Statutes, 690, 709, March 3, 1911, Chap-

ter 231, Section 236, 237, 36 Stat. 1156; Dec. 23, 1914, chapter 2, 38 Stat. 790; Sept. 6, 1916, chapter 448, Section 2, 39 Stat. 726; Feb. 17, 1922, chapter 54, 42 Stat. 366; Feb. 13, 1925, chapter 229, Section 1, 43 Stat. 937; 28 U. S. C. A., Sec. 344b.

The Supreme Court of Mississippi, the highest court of that State in which a decision could be had, wrongfully denied the rights, privileges and immunities specifically claimed under the Federal Constitution and Federal statutes.

III.

Statement of the Case.

A statement has been heretofore made in the application for the Writ of Certiorari which, when requisite, will be supplemented under the specific points.

IV.

Specification of Errors.

The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Newton County and in refusing to grant plaintiff the relief claimed because—

(a) Said tax (Appendix B), contravenes that Federal Statute (Appendix A), March 8, 1938, Chapter 44, Section 5, 52 Statutes 108, 15 U. S. C. A. (Supplement) 713a—5, Mississippi being without power by reason of said Federal Statute to exact a privilege tax of 2% of the gross receipts arising from the amount paid by the Credit Corporation for (a) storage, and (b) compression, of each bale of cotton handled by such Federal Warehouse for such Credit Corporation.

(b) Said statute (Appendix B) is, as construed, an unconstitutional imposition upon the Federal instrumentality

where Congress has vouchsafed complete immunity to the Credit Corporation. *United States* v. *Arlene Summerlin*, — U. S. —, 84 L. Ed. 963.

(c) The immunity of the Commodity Credit Corporation under the Commodity Credit Corporation Act (Appendix B), approved March 8, 1938, must have thereinto integrated, to effectuate the intent of Congress, the decisions of this Court then (March 8, 1938) existent and controlling. This Court by a change of decision since March 8, 1938, is powerless to amend by judicial legislation this act of Congress and thereby change the immunization granted at the time of its enactment.

(d) And for other causes apparent.

V.

Manner Wherein Federal Questions Were Raised.

In the declaration (R. 1) there is specific averment made of the rights of plaintiff under the Constitution and statutes of the United States, the averment thereasto being:

> "The State of Mississippi is prohibited by its own legislative act and by the constitution of the United States and its statutes from levying and collecting a tax on the sales thus made to the United States Government through its agency and instrumentality, the Commodity Credit Corporation, and the exaction of the alleged tax violates the constitution of the United States and Statutes thereof because it is a direct burden upon the exercise of a federal governmental function. The collection of the alleged tax hinders Commodity Credit Corporation in the efficient exercise of the powers and duties which it was organized to discharge, increase the cost of the service which this instrumentality renders in behalf of the United States Government, deprives it of the power to properly and freely serve the government in the manner intended, is

a direct obstruction to the exercise of federal powers, and violates the immunity of the federal government from taxation by the states. The imposition of the alleged tax on the business and functions of Commodity Credit Corporation in its dealings with Plaintiff was, therefore, unauthorized and unlawful, and Plaintiff is entitled to repayment of same from the Defendant" (R. 4).

To this declaration a demurrer was interposed and sustained, and, on appeal, the judgment affirmed. In short, plaintiff handled for the Credit Corporation, as a warehouseman, Federally licensed, cotton, either (a) storing it, or (b) compressing it, as directed, and for each bale so thus stored or compressed, it received an amount from the Credit Corporation, and on such amount, by the State of Mississippi, was compelled to pay 2% gross, which tax thus imposed augmented the charge made to the Credit Corporation for the service rendered, and was passed to the Credit Corporation, in part, at least.

ARGUMENT.

Point I.

Said Mississippi Tax Statute (Appendix B) contravenes said Federal Statute (Appendix A).

Plaintiff, a duly licensed United States Warehouse, rendered storage and compression services to Credit Corporation and received therefor on each bale a fixed price.

Thereon, this imposition was a privilege tax. Section 1, Chapter 119, Laws Mississippi, 1934, provides:

> "The term 'gross income' means the gross receipts of a taxpayer received as compensation for personal services for the exercise of which a privilege tax is imposed in this state and the gross receipts of the taxpayer derived from trades, business, commerce or sales

and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deductions * * *."

Section 2 of the act is:

"There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the *business activities*, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows: * * *." (Italics ours unless noted otherwise.)

Under 2-f, as amended, Section 6, Chapter 158, Laws 1936:

"Upon every person engaging or continuing within this state in any of the following businesses: * * * cotton compresses, * * * there is likewise hereby levied and shall be collected a tax, *on account of the business engaged in*, equal to two per cent of the gross income of the business."

Section 2-h, as amended by Chapter 222, Laws of 1934, is as follows:

"In computing the amount of tax levied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sale, as the case may be, so much thereof as is derived from sales to the United States government or the state of Mississippi, its departments and institutions, * * * or from business which the state of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States."

For each bale stored and each bale compressed by plaintiff, for Credit Corporation, in the discharge of its governmental functions, a privilege tax equaling two per cent of the gross receipts was exacted, which, as admitted by the demurrer, increased the cost to the Credit Corporation, (a) expressly, and (b) impliedly.

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 221, 72 L. Ed. 857, 858, 48 S. Ct. 451, 56 A. L. R. 583; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 75 L. Ed. 1277; *Graves* v. *Texas Company*, 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818.

Division A, as to the rule in Mississippi, under the decision of *State Tax Commission* v. *Brown* (Appendix D) (See Point II, *infra*), assumed to follow *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, where Mississippi's court assumed to say that the majority held:

> "An occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal government, even though the imposition of the tax may increase the cost to the government of the work contracted to be done,"

but this case is clearly, with deference, distinguishable:

1. The Chief Justice said:

> "There is the further suggestion that if the present tax of two per cent is upheld, the State may lay a tax of twenty per cent or fifty per cent or even more, and make it difficult or impossible for the Government to obtain the service it needs. *The argument ignores the power of Congress to protect the performance of the functions of the national government and to prevent interference therewith through any attempted state action.*"

The power of taxation may be utilized for some other purpose, even to the extent of destroying a business. *Sun-*

shine Anthracite Coal Co. v. *Adkins*, — U. S. —, 84 L. Ed. 825, 830; *Alaska Fish, etc., Co.* v. *Smith*, 255 U. S. 48, 65 L. Ed. 495; *Pacific American Fisheries* v. *Alaska*, 269 U. S. 269, 70 L. Ed. 272; *Magnano* v. *Hamilton*, 292 U. S. 40, 78 L. Ed. 1109.

The condition of the country, due to the depression, is a matter whereof this Court takes judicial notice. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413. And likewise how cotton is stored and compressed may likewise be judicially noticed. Compare *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 78 L. Ed. 622, 166 Miss. 739, 147 So. 325. As an instrumentality to alleviate, the Credit Corporation was created, to whom tax immunity was granted in these words:

> "*The Commodity Credit Corporation, including its franchise, its capital* * * * and its income shall be exempt from *all* taxes now or hereafter imposed by * * * any state * * * *except that any real property* of the Commodity Credit Corporation *shall be subject* to state * * * taxation *to the same extent* according to the value *as other real property is taxed*" (Appendix A).

Is this privilege tax admeasured by gross income of plaintiff passed in part to the Credit Corporation in contravention of this exemption?

(a) Thereunder is an express authorization for State taxation, dealing with "the Commodity Credit Corporation, including its franchise, its capital and income" and tax imposition may not be had except upon "real property" "according to its value as other real property is taxed." Hereunder, Congressional authorization of tax imposition is a condition precedent. *Ex Parte Bransford*, — U. S. —, 84 L. Ed. 846; *Colorado National Bank* v. *Bedford*, — U. S. —, 84 L. Ed. 730; *Tradesmens National Bank* v. *Oklahoma Tax Commission*, — U. S. —, 84 L. Ed. 588.

Hence, as to said Credit Corporation, that solely taxable was real estate in accordance with this permission, and before the State might levy, it must coordinate its tax with the permission therefor granted by Congress, pursuant to plenary power thereover exercised. *Citizens Savings Bank* v. *Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265.

(b) As to the Credit Corporation, the immunity is precise.

In *Pittman* v. *Home Owners Loan Corporation*, 308 U. S. 21, 84 L. Ed. 19, 124 A. L. R. 1253, this Court said:

> "We assume here, as we assumed in Graves *v.* New York, 306 U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466, that the creation of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. M'Culloch *v.* Maryland, 4 Wheat. 316, 421, 422, 4 L. Ed. 579, 605; Smith *v.* Kansas City Title & T. Co., 255 U. S. 180, 208, 209, 65 L. Ed. 577, 588, 589, 41 S. Ct. 243; Graves *v.* New York, supra. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' M'Culloch *v.* Maryland, supra (4 Wheat. p. 426, 4 L. Ed. 606). This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. 1, Sec. 8, Par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the

national field. Shreveport Case (Houston, E. & W. T. R. Co. *v.* United States) 234 U. S. 342, 351, 352, 58 L. Ed. 1341, 1348, 1349, 34 S. Ct. 833. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., Bank of New York *v.* New York County (New York ex rel. Bank of New York *v.* New York County) 7 Wall. 26, 31, 19 L. Ed. 60, 62; Choate *v.* Trapp, 224 U. S. 665, 668, 669, 56 L. Ed. 941, 943, 32 S. Ct. 565; Smith *v.* Kansas City Title & T. Co., supra (255 U. S. p. 207, 65 L. Ed. 588, 41 S. Ct. 243); Trotter *v.* Tennessee, 290 U. S. 354, 356, 78 L. Ed. 358, 259, 54 S. Ct. 138; Lawrence *v.* Shaw, 300 U. S. 245, 249, 81 L. Ed. 623, 626, 57 S. Ct. 443, 108 A. L. R. 1102. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. 6."

Approved, *Tradesman Nat. Bank* v. *Oklahoma Tax Commission*, — U. S. —, 84 L. Ed. 591.

In *Federal Land Bank of New Orleans* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 705, Mr. Justice Holmes said:

> "The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so, it cannot say that it leaves the bank free to record or not. The bank has a choice, it is true, but so has one who acts under duress. The Eliza Lines, 199 U. S. 119, 131, 50 L. Ed. 115, 120, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406.
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> "The state is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its courts in cases which

those courts are otherwise competent to entertain. Kenney *v.* Supreme Lodge, L. O. M. 252 U. S. 411, 415, 64 L. Ed. 638, 640. 10 A. L. R. 716, 40 Sup. Ct. Rep. 371. It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end.

"Of course, the state is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. D. E. Foote & Co. *v.* Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. Rep. 377. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the supreme court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the supreme court, as distinguished from the interpretation of it, does not bind this court. St. Louis Southwestern R. Co. *v.* Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99; St. Louis Cotton Compress Co. *v.* Arkansas, December 4, 1922 (260 U. S. 346, ante, 297, 43 Sup. Ct. Rep. 125). It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax; but, whoever pays it, it is a tax upon the mortgage, and that is what is forbidden by the law of the United States."

(c) Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user. *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 76 L. Ed. 1232; *McGoldrick* v. *Berwind-White Coal Mining Co.,* — U. S. —,

84 L. Ed. 343, and when, though authorized, there was a specific immunization, this type of taxation could not be collected. *McGoldrick* v. *Compagnie General Transatlantique*, — U. S. —, 84 L. Ed. 602; *McGoldrick* v. *Gulf Oil Corporation*, — U. S. —, 84 L. Ed. 597.

Of this tax, it was said by its creator, Governor Connor:

> "The retail sales tax is not a tax upon business, except insofar as business elects to make it so. It was never intended to be other than a consumption tax, to be passed on to the purchaser. One of the chief purposes of the sales tax is to decrease the tax burden by broadening the tax base. There are today in Mississippi thousands of people who pay no taxes, but who enjoy all the rights and privileges of citizenship. These people will be glad of an opportunity to have a share in the responsibility of maintaining the government of the state in which they live. Surely it will not be seriously argued that a contribution to the state of only $2.00 on $100.00 of purchases is a hardship upon anybody."

Therein, this Court has substantially concurred. Compare *Crawford* v. *Hubbell*, 89 Fed. 961, 177 U. S. 419, 44 L. Ed. 829; *American Express Co.* v. *Maynard*, 77 N. W. 320, 118 Mich. 682, where, upon appeal, Mr. Justice White, 177 U. S. 404, reversed the decision and sustained the right to thus pass the tax. See *Dinsmore* v. *Southern Express Co.*, 102 Fed. 794, 805, 183 U. S. 115.

By this Tax Statute, an imposition has been made on the Credit Corporation, and that which would have been income has been specifically diverted, so that this agency, created to effectuate the definite purpose, has had that purpose thwarted to the extent of the imposition accruing from the tax here, which inheres in the business relation between plaintiff and the Credit Corporation and is imposed solely and exclusively therefor.

Mississippi's Court has not construed this particular section, but where there has been a sale of tangible personal property, Mississippi's legislature has made it mandatory that the tax be specifically passed, leaving, however, the parties free to pass the other impositions, which admittedly has been done herein.

Compare *Woodrich* v. *St. Catherine Gravel Co.*, 195 So. 307; *State ex rel.* v. *Allen*, 180 Miss. 659, 177 So. 763; *Notgrass Drug Co.* v. *State*, 175 Miss. 358, 165 So. 884; *Southern Package Corp.* v. *State Tax Commission*, 164 So. 45, 174 Miss. 212. As to the operations of a somewhat similar tax, compare *McGoldrick* v. *Compagnie General Transatlantique*, — U. S. —, 84 L. Ed. 602; *McGoldrick* v. *Gulf Oil Corporation*, — U. S. —, 84 L. Ed. 597.

In *James Stewart & Co.* v. *Sadrakula*, — U. S. —, 84 L. Ed. 375, the majority of the Court said:

> "But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

2. Therein, 82 L. Ed. 167, 302 U. S. 150, the Chief Justice said:

> "The observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without duly limiting the taxing power which is equally essential to both nation and state under our dual system,"

and declared:

> "The tax is not laid upon a contract of the Government,"

citing as still operative in that aspect: *Osborn v. Bank of United States*, 9 Wheat. 867, 6 L. Ed. 234; *Weston* v.

Charleston, 2 Pet. 449, 468, 475, 7 L. Ed. 481, 488, 490; * * * *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 67 L. Ed. 703; * * * *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 222, 72 L. Ed. 857, 858; * * * *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 574, 75 L. Ed. 1277, 1280, * * * *Graves* v. *Texas Co.,* 298 U. S. 393, 401, 80 L. Ed. 1236, 1242."

The West Virginia statute made the imposition "Upon every person engaging or continuing within this State in the business of contracting, the tax shall be equal to two per cent. of the gross income of the business", but in Mississippi the tax is "*on account of the business activities*", which is again reiterated 2-f, "on account of the business engaged in", thus bringing Mississippi's statute under these differentiated cases.

Note, further, that the *Dravo* case applies *Western U. Teleg. Co.* v. *Texas,* 105 U. S. 460, 26 L. Ed. 1067, where there was condemned a tax of a specific amount on each message sent by the officers of the United States, and, thereunder, were reviewed the decisions of this Court from *Brown v. Maryland,* to date. This tax is of a specific amount on account of the business done, and confessedly, is on the Credit Corporation, which is specifically immunized.

Further, in the *Dravo* case, there is reviewed *Alward* v. *Johnson,* 282 U. S. 509, 514, 75 L. Ed. 496, 499, and thereof it was said:

> "In upholding the tax upon his gross receipts we distinguished Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, *supra,* saying: 'There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. * * * The facts in Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, and New Jersey Bell Teleph. Co. v. State Bd. of Taxes and Assessments,

280 U. S. 338, 74 L. Ed. 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here."

3. Furthermore, as correctly stated by the Chief Justice, 82 L. Ed. 171, 302 U. S. 158:

> "Respondent has no constitutional right to immunity from non-discriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims."

And in the *Dravo* case, it was expressly stipulated (82 L. Ed. 172, 302 U. S. 159):

> "Respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond and property taxes,' "

but herein, there is no such intimation, and the exaction does augment and has been passed to the Credit Corporation, which is unable to avoid it, because this corporation, at that place, is the sole Federal Warehouse where such rendition of service may be had, and thus, the Credit Corporation must be taxed contrary to that specifically thereasto provided in Appendix A.

It is true that where Congress has not made any such express immunization as here occurs, this Court has subsequently sustained a non-discriminatory net income tax covering officers of the United States. Compare *Graves*

v. *New York*, 306 U. S. 466, 83 L. Ed. 927; *Helvering* v. *Gerhardt*, 304 U. S. 405, 83 L. Ed. 1427. Under these cases, there is no constitutional immunity, but there is a power in Congress to immunize, which, when exercised, is operative to make effective that which precedently was held to immunize under the Constitution, *per se*.

4. As further condemnatory of this act, we direct attention to the review of the authorities in this Court by the dissenting opinion in the *Dravo* case, by Mr. Justice Roberts.

POINT II.

The immunity of the Commodity Credit Corporation under the Commodity Credit Corporation Act (Appendix A), approved March 8, 1938, must have thereinto integrated, to effectuate the intent of Congress, the decisions of this Court then (March 8, 1938) existent and controlling. This Court by a change of decision since March 8, 1938, is powerless to amend by judicial legislation this Act of Congress and thereby change the immunization granted at the time of its enactment.

But if plaintiff errs as to the present law, yet, the immunizing act was passed March 8, 1938, whereinto were integrated the controlling decisions then existent by this Court, and judicial legislation amending this statute is not permissible, and therefore the immunities then vouchsafed by the decisions of this Court were thereinto integrated and may not be therefrom judicially deleted.

As a preface, the case of *Mississippi Tax Commission* v. *Brown*, 193 So. 795, was decided by Division A of Mississippi's Supreme Court, composed of Chief Justice Smith, Anderson and Griffith, Associate Justices, January 29, 1940. Pursuant to Section 145 of Mississippi's Constitution (Appendix E), the court is composed of six members, Division B being Presiding Justice Ethridge, McGowan and McGehee. Upon February 19, 1940, before the judgment

herein became final, that court, in banc, decided *Mississippi State Tax Commission* v. *Brown*, 193 So. 795, — Miss. — (Appendix D), wherein it construed Chapter 120, Laws of Mississippi, 1934, the act here in question being Chapter 119 and approved approximately at the same time, and before the decision fundamentally altering the principles announced in this Court and then operative through its decisions.

Mississippi's court then cited many cases from this Court, running back 100 years and more, among them, *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. Ed. 338, wherein it quoted to approve,

> "A state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian lands from sales of his share of oil and gas received under his leases."

And then Presiding Justice Ethridge said:

> "All the decided law, therefore, at the time of the enactment of the statute here involved was to the effect that Federal instrumentalities were not taxed, and could not be taxed without the consent of Congress. And we must assume that the legislature enacted the statute here involved in the light of these decisions, and intended to conform to them; and its action must be interpreted in the light of these decisions.
>
> "The legislature cannot be held to foresee that the Court would change its decisions, and legislative acts cannot be rightfully interpreted in the light of decisions rendered after the enactment of the statute."

Mississippi's court, in so doing, assumed to follow the law as at that time established by this Court, that is, at the date of the enactment, March 8, 1938, quoting to approve 25 R. C. L. 959, Section 215, as follows:

> "In 25 R. C. L., 959, section 215, under heading, 'Meaning to be Given as of Time of Enactment,' it is said, 'There is always a tendency, it has been said, to

construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience. The true rule is that statutes are to be construed as they were intended to be understood when they are passed;' citing United States *v.* Union Pacific R. Co., 91 U. S. 72, 23 L. Ed. 224; Schuyler County *v.* Thomas, 98 U. S. 169, 25 L. Ed. 88; Com. *v.* Erie & N. E. R. Co., 27 Pa. 339, 67 Am. Dec. 471; Platt *v.* Union P. R. Co., 99 U. S. 48, 63, 25 L. Ed. 424; Bloomer *v.* Todd, 3 Wash. T. 599, 19 P. 135, 1 L. R. A. 111; see, also, People *v.* Barnett, 319 Ill. 403, 150 N. E. 290; State *v.* Boston, etc., R. Co., 123 Me. 48, 121 A. 541."

That court then reviewed divers decisions in this Court, and interpreting them, held that Congress could not be held "to foresee that the Court would change its decisions, and legislative acts cannot be rightfully interpreted in the light of decisions rendered after the enactment of the statute."

So here, this enactment of March 8, 1938, may not be altered by judicial legislation from that then intended by Congress, for into that statute were integrated each of the decisions then existent, as well as similar broad exemptions given similar governmental agencies.

Gelpcke v. *Dubuque,* 1 Wall. (U. S.) 175, 206, 17 L. Ed. 520; *Ohio Life Ins. & Trust Co.* v. *Debolt,* 16 How. (U. S.) 416, 432, 14 L. Ed. 997; *Havemeyer* v. *Iowa County,* 3 Wall. (U. S.) 294, 303, 18 L. Ed. 38; *Wisconsin Lumber Co.* v. *State,* 97 Miss. 571, 578, 54 So. 247; *Bank of Philadelphia* v. *Posey,* 130 Miss. 825, 95 So. 134.

So when this immunity existed under the *Dravo* case, it was the intention of Congress to put into this statute that then said to be the true interpretation of the Constitution. When Congress so did, this Court, without the consent of Congress, may not, with deference, by a subsequent change in its rulings, alter that thus into the statute integrated by Congress. In short, there may not be, by a change of decision, a subversion of Congressional intention placed in a

statute at the time it was enacted. If Congress, as it may, desires to repeal, it may so do, but until it does, the interpretation of the statute must remain uniform.

(a) This Court, by a majority, in the *Dravo* case, said:

> "The tax is not laid upon the Government, its property or officers. Dobbins *v.* Erie County, 16 Pet. 435, 449, 450, 10 L. Ed. 1022, 1027, 1028."

Graves v. *New York*, 306 U. S. 466, 83 L. Ed. 927, which overruled *Dobbins* v. *Erie County*, was not decided until March 27, 1939. So that, until 1939, Congress, in passing its acts, was authorized to assume, and, with deference, did assume that those decisions then outstanding as expositions of the Constitution, admeasured the rights thereunder by Congress declared and intended so to be.

(b) The *Dravo* case further said:

> "The tax is not laid upon the contract of the Government", citing therefor *Osborn* v. *Bank of United States*, 9 Wheat. 867, 6 L. Ed. 234; *Weston* v. *Charleston*, 2 Pet. 449, 468, 475, 7 L. Ed. 481, 488, 490; and especially, *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 464, 466, 26 L. Ed. 1067, 1068, 1069; *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 703, 29 A. L. R. 1; *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 222, 72 L. Ed. 857, 858; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 574, 75 L. Ed. 1277, 1280; *Graves* v. *Texas Co.*, 298 U. S. 393, 401, 80 L. Ed. 1236, 1242, and it was

there held, citing the *Weston* case and others,

> "Taxes on interest from government securities were held to be laid on the government's contract—upon the power to borrow money—and hence were invalid,"

which was before Congress when this statute was passed.

(c) *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. Ed. 1067, is cited, where it is said:

> "In this the court but applied the rule, announced in Brown *v.* Maryland, 12 Wheat., 444, that where the

burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are Welton *v.* Missouri, 91 U. S. 275 (XXIII, 347); Cook *v.* Pennsylvania, 97 U. S. 566 (XXIV, 1015), and Webber *v.* Virginia (ante, 565). And in Passenger Cases, 7 How., 283; Crandall *v.* Nevada, 6 Wall., 35 (73 U. S. XVIII, 745), and Henderson *v.* Mayor of N. Y., 92 U. S. 259 (XXIII, 543), taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers; and in State Tonnage Cases, 12 Wall., 204 (79 U. S. XX, 370); Peete *v.* Morgan, 19 Wall., 581 (86 U. S., XXII, 201); Cannon *v.* New Orleans, 20 Wall., 577 (87 U. S. XXII, 417), and Steamship Co. *v.* Tinker, 94 U. S. 238 (XXIV, 118), that taxes on vessels according to measurement, without any reference to value, were taxes on tonnage."

See, also, *Leloup* v. *Mobile*, 127 U. S. 640, 32 L. Ed. 311 and *Williams* v. *Talladega*, 226 U. S. 404, 57 L. Ed. 275.

(d) "In Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, supra, and Indian Motocycle Co. *v.* United States, 283 U. S. 570, 75 L. Ed. 1277, 51 S. Ct. 601, supra, the taxes were held to be invalid as laid on the sales to the respective governments, the one being a state tax on a sale to the United States, and the other a federal tax on the sale to a municipal corporation of Massachusetts. A similar result was reached in Graves *v.* Texas Co., 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818, supra. These cases have been distinguished and must be deemed to be limited to their particular facts."

Thus, this immunization was consciously present with Congress when this act was passed, and in *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. Ed. 496, 499, 51 S. Ct. 273, 75

A. L. R. 9, further reference was made to the *Panhandle Oil* case, thus:

> "There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely * * * The facts in Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, and New Jersey Bell Telph. Co. *v.* State Bd. of Taxes & Assessments, 280 U. S. 338, 74 L. Ed. 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here."

(e) In *Metcalf* v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384, the differentiation between a net income tax and a gross income tax was pointed out.

> "In Thomson *v.* Union P. R. Co., 9 Wall. 579, 19 L. Ed. 792, supra, the Court pointedly referred to the authority of Congress to prevent such an interference through the use of taxing power of the State. 'It cannot,' said the Court, 'be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.' See Van Allen *v.* Assessors (Churchill *v.* Utica) 3 Wall. 573, 585, 18 L. Ed. 229, 235; Fidelity & D. Co. *v.* Pennsylvania, 240 U. S. 319, 60 L. Ed. 664, 36 S. Ct. 298, supra."

We likewise, with deference, refer to the cases collated by Mr. Justice Roberts in his dissenting opinion:

(1) *M'Culloch* v. *Maryland,* 4 Wheat. 316, 436, 4 L. Ed. 579, 608;

(2) *Western U. Teleg. Co.* v. *Texas,* 105 U. S. 465, 26 L. Ed. 1068;

(3) *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 221, 72 L. Ed. 857, 858, 48 S. Ct. 451, 56 A. L. R. 583;

(4) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 75 L. Ed. 1277, in addition to many others, and, therefore, with deference, we have substantially a unanimous Court, as at that date, recognizing the existence of a limited constitutional immunity, which Congress made applicable as at March 8, 1938 and these decisions thus delineating Federal power were those whereto Congress necessarily adverted in making this immunity, and until Congress changes that which it thus established, with deference, this Court may not legislatively amend a Congressional immunization. Possibly, due to the holding of Division A of the Mississippi Court, it is obligatory upon this Court to make operative this latest decision thereasto in Mississippi under the Constitution as interpreted by Mississippi. *Wisconsin Lumber Co.* v. *State*, 97 Miss. 571. And failing therein, this Court should so thus do.

WHEREFORE, it is respectfully submitted that, as properly interpreted, the Credit Corporation Act, immunizing this transaction from this State taxation, but if therein we err, then as at March 8, 1938, Congress intended to make operative by Appendix A, the immunity from this State tax, Appendix B, then existing under the decisions of this Court, and this Court, with deference, by a change in decision not then to be foreseen, may not presently judicially legislate to amend the intention of Congress existent when the statute was approved.

Respectfully,

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